**NOT FOR CITATION**

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

WILLIAM S. OSWALD,

Petitioner,

vs.

A.P. KANE, Warden,

Respondent.
_____/

No. C 05-0173 PJH (PR)

**ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS**

Petitioner, a California prisoner incarcerated at the Correctional Training Facility in Soledad ("CTF"), has filed a petition for a writ of habeas corpus challenging the 2003 decision of the Board of Parole Hearings ("Board," formerly the Board of Prison Terms) denying him parole. This matter is now before the court for consideration of the merits of the habeas petition. For the reasons set forth below, the petition is denied.

## BACKGROUND

The Board summarized the facts of the commitment offense as follows:

> During the early morning hours of August 28[, 1988,] the inmate, using a Uzi submachine gun, shot and killed one woman and seriously wounded another. The crimes occurred sometime after the inmate had concluded . . . a drug purchase with one or both of the victims. Believing that he had been cheated in the transaction, this inmate attempted to convince the women to return his money or otherwise make good on the deal. When one of the women threw a bottle at the side of his truck to frighten him away, Mr. Olsen, assuming that he was being attacked, exited his vehicle, retrieved the Uzi and commenced firing. At trial the inmate claimed that he had ingested a significant quantity of cocaine and alcohol in the hours preceding the crimes and that the drugs had affected his perception of events. On this, and related evidence, he was convicted, the jury having obviously rejected his testimony that he held an honest but unreasonable belief in the need to defend himself.

Answer Ex. C (May 2, 2003, hearing transcript) at 9-10.

On May 17, 1989, a jury in Los Angeles County Superior Court convicted Petitioner of second degree murder and attempted second degree murder, and found true the allegation of use of a firearm. Answer Ex. A (Abstract of Judgment and Judgment). Petitioner was sentenced to seventeen years to life. Petitioner was received into custody by the California Department of Corrections on June 20, 1989.

Petitioner did not attend his initial parole hearing in January 1999, at which he was denied parole for four years. On May 2, 2003, Petitioner appeared before the Board for a subsequent parole consideration hearing and was represented by counsel. At the time of the 2003 hearing, petitioner was forty-nine years old and had been in state custody for about fourteen years. The Board considered petitioner's commitment offense, prior criminality, social history, and behavior during imprisonment. The Board reviewed petitioner's central file and Board packet, any new reports, his psychiatric evaluation, and his parole plans. Answer Ex. C at 3-4. During the hearing, petitioner presented about eighteen letters of support from family members, friends and community members. *Id.* at 33-38. Also present at the hearing was a deputy district attorney from Los Angeles County who stated on the record that the District Attorney opposed a finding of suitability. *Id.* at 48-49.

The Board concluded that petitioner was not suitable for parole and would pose an unreasonable risk of danger to society if released from prison. *Id.* at 56. The Board first considered the commitment offense: the Board found that it was carried out in a cruel manner with a disregard for human suffering, that it was carried out with a disregard for the safety or well-being of others, that he went to that location to purchase drugs and fired his gun rather than drive away when he felt threatened, that he fired seventeen shots, that multiple victims were attacked, that there were a number of people present when he fired, and that one person was killed and another wounded. *Id.* at 56-57. The Board further considered petitioner's arrest record related to his substance abuse, including time spent on probation, time in county jail and a diversion program, and noted that these programs did not correct his criminality. *Id.* at 57.

With regard to institutional behavior, the Board considered that petitioner improved his education and participated in self-help programs, including Alcoholics Anonymous, Narcotics Anonymous and the Straight from the Heart program. *Id.* at 58. The Board noted, however, that petitioner received two "115" serious rules violation reports, including one since his last parole hearing, and three "128" counseling chronos since his incarceration. *Ibid.* The Board reviewed petitioner's most recent psychological evaluation, dated October 1998, and noted that it was positive but pre-dated his more recent "115" violation. *Ibid.*

The Board ordered another psychological evaluation for petitioner's next parole hearing and denied parole for four years. *Ibid*. The Board based this finding on petitioner's commitment offense, criminal record, prison disciplinary record, and the District Attorney's opposition to parole suitability. *Id.* at 58-59. The Board encouraged petitioner to continue participating in self-help and outreach programs and to avoid disciplinary reports, and noted that the seriousness of the offense far outweighed his accomplishments in prison. *Id.* at 59.

Following the Board's decision denying parole, petitioner filed an administrative appeal which was denied on October 15, 2003. Answer Ex. F. Petitioner filed a petition for a writ of habeas corpus in Los Angeles County Superior Court, which denied the petition on March 3, 2004, on the grounds that he failed to show a prima facie case for relief, and that Los Angeles County was not the appropriate jurisdiction for seeking relief from the Board's actions. Answer Ex. E. The Court of Appeal and the California Supreme Court summarily denied his subsequent petitions for relief. Answer Exs. F, G.

Petitioner timely filed this federal petition for a writ of habeas corpus on January 12, 2005. Respondent answered and petitioner filed a traverse. The matter is submitted for a decision on the merits.

**STANDARD OF REVIEW**

A district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an

unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to mixed questions of law and fact, *Williams (Terry) v. Taylor*, 529 U.S. 362, 407-09 (2000), while the second prong applies to decisions based on factual determinations, *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

A state court decision is "contrary to" Supreme Court authority, that is, falls under the first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams (Terry)*, 529 U.S. at 412-13. A state court decision is an "unreasonable application of Supreme Court authority, falling under the second clause of § 2254(d)(1), if it correctly identifies the governing legal principle from the Supreme Court's decisions but "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The federal court on habeas review may not issue the writ "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. Rather, the application must be "objectively unreasonable" to support granting the writ. *Id.* at 409.

Under Section 2254(d)(2), a state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El*, 537 U.S. at 340.

When there is no reasoned opinion from the highest state court to consider the petitioner's claims, the court looks to the last reasoned opinion of a state court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801-806 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n. 2 (9th Cir. 2000), *cert. denied*, 534 U.S. 944 (2001). Where the state court gives no reasoned explanation of its decision on a petitioner's federal claim and there is no reasoned lower court decision on the claim, a federal court conducts "an independent review of the

record" to determine whether the state court's decision was an unreasonable application of clearly established federal law. *See Plascencia v. Alameida*, 467 F.3d 1190, 1198 (9th Cir. 2006); *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003).

**DISCUSSION**

Petitioner alleges that the Board's 2003 decision denying him parole violated his right to due process, and that the Board demonstrates systematic bias against granting parole. Petitioner also raises a new claim challenging the Board's decision as violating his right to jury trial. None of these claims merits habeas relief.

**I. Due Process in Parole Suitability Determinations**

**A. Some Evidence Standard of Judicial Review**

The Ninth Circuit has determined that a California prisoner with a sentence of a term of years to life with the possibility of parole has a protected liberty interest in release on parole and therefore a right to due process in the parole suitability proceedings. *See McQuillion v. Duncan*, 306 F.3d 895, 902 (9th Cir. 2002) (citing *Board of Pardons v. Allen*, 482 U.S. 369 (1987); *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1 (1979)). *See also Irons v. Carey*, 505 F.3d 846, 851 (9th Cir.), *reh'g and reh'g en banc denied*, 506 F.3d 951 (9th Cir. 2007); *Sass v. California Board of Prison Terms*, 461 F.3d 1123, 1127-28 (9th Cir. 2006), *reh'g and reh'g en banc denied*, No. 05-16455 (9th Cir. Feb. 13, 2007); *Biggs v. Terhune*, 334 F.3d 910, 915-16 (9th Cir. 2003) (finding initial refusal to set parole date for prisoner with fifteen-to-life sentence implicated prisoner's liberty interest).

A parole board's decision satisfies the requirements of due process if "some evidence" supports the decision. *Sass*, 461 F.3d at 1128-29 (adopting some evidence standard for disciplinary hearings outlined in *Superintendent v. Hill*, 472 U.S. 445, 454-55 (1985)). *See also Irons*, 505 F.3d at 851. "To determine whether the some evidence standard is met 'does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the

conclusion reached'" by the parole board. *Sass*, 461 F.3d at 1128 (quoting *Hill*, 472 U.S. at 455-56). The "some evidence standard is minimal, and assures that 'the record is not so devoid of evidence that the findings of the . . . board were without support or otherwise arbitrary.'" *Id.* at 1129 (quoting *Hill*, 472 U.S. at 457).

Respondent contends that an inmate is entitled to only minimal protections to satisfy due process in a parole proceeding. Citing *Greenholtz*, Respondent contends that due process in state parole procedures is satisfied merely if they afford the inmate an opportunity to be heard and a decision informing him why he did not qualify for parole release. The Ninth Circuit, however, has held that requiring less than the some evidence standard "would violate clearly established federal law because it would mean that a state could interfere with a liberty interest - that in parole - without support or in an otherwise arbitrary manner." *Sass*, 461 F.3d at 1129. Thus, the some evidence standard of *Superintendent v. Hill* is clearly established law in the context of parole denial for purposes of federal habeas review. *Ibid*.

**B. Some Evidence in the Record to Support Board Decision**

In Claim One, petitioner challenges the Board's decision as unsupported by some evidence having an indicia of reliability. Citing *Biggs*, petitioner contends that he has been free of discipline and violent behavior during his incarceration, and suggests that the Board cannot rely on unchanging factors such as the gravity of the offense and prior criminal history to deny parole where he has demonstrated good behavior and engaged in rehabilitative programs. The court construes this claim to raise two challenges: first, that the Board's decision was not supported by some evidence, and second, that the Board's reliance solely on the circumstances of the commitment offense as grounds for denial violated due process under *Biggs*. In the absence of a reasoned state court decision on the merits of this claim, the court has conducted an independent review of the record and determines that some evidence supports the Board's findings and that there is no basis for relief on the purported *Biggs* claim.

**1. Some Evidence**

First, petitioner contends that the Board's decision was not supported by some evidence having an indicia of reliability. In assessing whether the Board's denial of parole was supported by some evidence, the court's "analysis is framed by the statutes and regulations governing parole suitability determinations in the relevant state." *Irons*, 505 F.3d at 851 (citing *Biggs*, 334 F.3d at 915). "Accordingly, here we must look to California law to determine the findings that are necessary to deem a prisoner unsuitable for parole, and then must review the record in order to determine whether the state court decision holding that these findings were supported by 'some evidence' in [petitioner's] case constituted an unreasonable application of the 'some evidence' principle articulated in *Hill*, 472 U.S. at 454, 105 S.Ct. 2768." *Ibid.* Under California law, "[t]he Board must determine whether a prisoner is presently too dangerous to be deemed suitable for parole based on the 'circumstances tending to show unsuitability' and the 'circumstances tending to show suitability' set forth in Cal. Code. Regs., tit.15 § 2402(c)-(d)." *Ibid.*

Title fifteen, section 2402, of the California Code of Regulations sets forth the criteria for determining whether an inmate is suitable for release on parole. The circumstances tending to show that a prisoner is unsuitable include the following: (1) the commitment offense, where the offense was committed in "an especially heinous, atrocious or cruel manner;" (2) the prisoner's previous record of violence; (3) "a history of unstable or tumultuous relationships with others;" (4) commission of "sadistic sexual offenses;" (5) "a lengthy history of severe mental problems related to the offense;" and (6) "serious misconduct in prison or jail." Cal. Code. Regs., tit. 15 § 2402(c). The circumstances tending to show that a prisoner is suitable for parole include the following: (1) the prisoner has no juvenile record; (2) the prisoner has experienced reasonably stable relationships with others; (3) the prisoner has shown remorse; . . . (6) the prisoner lacks any significant history of violent crime; (7) the prisoner's present age reduces the risk of recidivism; (8) the prisoner "has made realistic plans for release or has developed marketable skills that can

be put to use upon release;" and (9) institutional activities "indicate an enhanced ability to function within the law upon release." Cal. Code. Regs., tit. 15 § 2402(d).

With respect to the commitment offense, the Board determined that petitioner committed the crime "in a cruel manner with a disregard for human suffering," and "with a disregard for the safety or the wellbeing of others." Answer Ex. C at 56. To support this finding, the Board considered that multiple victims were attacked, Cal. Code Regs. tit. 15 § 2402(c)(1)(A): one victim was killed, one was wounded and a number of others were exposed to great harm when petitioner fired his semiautomatic gun in the presence of a group of people.

The Board also considered petitioner's prior criminal record. Answer Ex. C at 56. Petitioner admits his prior convictions and his history of substance abuse, but contends that his prior crimes were not assaultive or violent to show unsuitability under the regulations, Cal. Code Regs. tit. 15 § 2402(c)(2). The regulations provide, however, that the Board consider not only violent criminal history, but all relevant, reliable information, such as "past criminal history, including involvement in other criminal misconduct which is reliably documented." *Id.* § 2402(b).

With respect to petitioner's disciplinary history during his incarceration, the Board considered that petitioner had received two "115" serious rules violations reports, including one since his last parole hearing in 1999. Answer Ex. C at 58. The more recent report, dated October 21, 2000, was issued for conduct likely to lead to violence. Answer Ex. D (Jan. 2003 Life Prisoner Evaluation Report) at 2. The Board also considered that Petitioner received three "128A" counseling chronos. Answer Ex. C at 58.

The Board considered petitioner's most recent psychological evaluation, dated October 15, 1998, which estimated that his violence potential within a controlled setting would be below average, and if released would be "no more than average relative to the average citizen in the community." Answer Ex. C at 32. The Board noted, however, that this favorable evaluation was prepared before petitioner's more recent serious rule violation, and ordered a new psychological evaluation. *Id.* at 58.

The record reflects that the Board's parole suitability determination was supported by some evidence. The state courts' denial of habeas relief on this claim was neither contrary to, nor an unreasonable application of, clearly established federal law.

**2. *Biggs* Claim**

Second, petitioner contends that the Board relied solely on his prior criminal history and commitment offense to deny parole, that such conduct before incarceration is not reliable evidence to support unsuitability because he has not "recently committed a criminal act," that he has not committed any violent acts in prison, and that "the Board's finding that the gravity of his offense and his previous criminal history from over fifteen (15) years past outweigh all of the positive factors of his imprisonment [demonstrating] his rehabilitation is contrary to the evidence which was before the Board." Petition at 10.

Petitioner relies on *Biggs* for dicta suggesting that over time, continuing to deny parole to an inmate who demonstrates exemplary behavior and evidence of rehabilitation could violate due process if the Board were to continue to rely solely on the unchanging factors of the commitment offense and conduct prior to imprisonment. *See Biggs*, 334 F.3d at 916-17. *Biggs* upheld the initial denial of a parole release date based solely on the nature of the crime and the prisoner's conduct before incarceration, but cautioned that the value of the criminal offense fades over time as a predictor of parole suitability: "The Parole Board's decision is one of 'equity' and requires a careful balancing and assessment of the factors considered. . . . A continued reliance in the future on an unchanging factor, the circumstance of the offense and conduct prior to imprisonment, runs contrary to the rehabilitative goals espoused by the prison system and could result in a due process violation." *Biggs*, 334 F.3d at 916-17.

Petitioner overstates *Biggs* as holding that an exemplary inmate cannot be denied parole solely on the basis of the commitment offense and conduct prior to imprisonment, but *Biggs* did not so hold. As the Ninth Circuit noted in *Sass*, "*Biggs* affirmed a denial of parole after holding that the circumstances of the offense and conduct prior to imprisonment constituted some evidence to support the Parole Board's decision." *Sass*,

461 F.3d at 1126 (citing *Biggs*, 334 F.3d at 917). *See Biggs*, 334 F.3d at 916 ("As in the present instance, the parole board's sole supportable reliance on the gravity of the offense and conduct prior to imprisonment to justify denial of parole can be initially justified as fulfilling the requirements set forth by state law.").

The Ninth Circuit has expressed competing views on *Biggs* in subsequent panel decisions. In *Sass*, the Ninth Circuit held that evidence of Sass's prior offenses and the gravity of his commitment offenses constituted some evidence to support the Board's decision. 461 F.3d at 1129. Acknowledging the cautionary statements in *Biggs* concerning the potential for a due process violation by continued reliance in the future on immutable factors, *Sass* criticized that part of the opinion as improper speculation about how future parole hearings could proceed. *Ibid.*

In *Irons*, however, the Ninth Circuit echoed the concern raised in *Biggs* and expressed its "hope that the Board will come to recognize that in some cases, indefinite detention based solely on an inmate's commitment offense, regardless of the extent of his rehabilitation, will at some point violate due process, given the liberty interest in parole that flows from the relevant California statutes." *Irons*, 505 F.3d at 854 (citing *Biggs*, 334 F.3d at 917). Although the court determined that the Board's unsuitability finding was supported by "some evidence" that Irons's crime was especially cruel and callous, the *Irons* panel pointed out that in the cases holding that sole reliance on the commitment offense did not violate due process, namely, *Irons*, *Sass* and *Biggs*, "the decision was made before the inmate had served the minimum number of years required by his sentence." *Irons*, 505 F.3d at 852-54. *Irons* reasoned that due process was not violated when these prisoners were deemed unsuitable for parole "prior to the expiration of their minimum terms," even if they had demonstrated substantial evidence of rehabilitation. *Id.* at 854.

Rehearing en banc was denied in both *Sass*, No. 05-16455 (9th Cir. Feb. 13, 2007), and *Irons*, 506 F.3d 951 (9th Cir. Nov. 6, 2007). However, the Ninth Circuit has recently granted rehearing en banc in *Hayward v. Marshall*, 512 F.3d 536 (9th Cir. 2008), *reh'g en banc granted*, __ F.3d ____, No. 06-55392 (9th Cir. May 16, 2008). The *Hayward* panel

concluded that the gravity of the commitment offense had no predictive value regarding Hayward's suitability for parole, and held that the Governor's reversal of parole was not supported by some evidence and resulted in a due process violation. 512 F.3d at 546-47. The Ninth Circuit since has ordered rehearing en banc, with oral argument set for June 24, 2008.

Unless or until the en banc court overrules the holdings of the earlier panel decisions in *Biggs*, *Sass* and *Irons*, these cases hold that California's parole scheme creates a federally protected liberty interest in parole and therefore a right to due process which is satisfied if some evidence supports the Board's parole suitability decision. *Sass*, 461 F.3d at 1128-29. These cases also hold that the Board may rely on immutable events, such as the nature of the conviction offense and pre-conviction criminality, to find that the prisoner is not currently suitable for parole, *Sass*, 461 F.3d at 1129. *Biggs* and *Irons* further suggest, however, that over time, the commitment offense and pre-conviction behavior become less reliable predictors of danger to society such that repeated denial of parole based solely on immutable events, regardless of the extent of rehabilitation during incarceration, could violate due process at some point after the prisoner serves the minimum term on his sentence. *See Irons*, 505 F.3d at 853-54.

Respondent contends that the court may not overturn the state court decision on the purported *Biggs* claim because *Biggs* is not clearly established federal law as determined by the Supreme Court. Assuming, without deciding, that under some circumstances, habeas relief may be granted under *Biggs* on a claim that parole denial based on continued reliance on the commitment offense and other unchanging factors does not satisfy the some evidence standard, the court finds that petitioner fails to establish the predicate for a *Biggs* claim. First, the Board did not rely solely on unchanging factors such as the commitment offense, but also considered petitioner's institutional behavior, particularly the recent serious rules violation report. Second, at the time of the 2003 Board decision, petitioner had been in custody for fourteen years and had not served the minimum term of his seventeen years-to-life sentence. *See Irons*, 505 F.3d at 854. Thus, the state courts'

denial of relief was neither contrary to, nor an unreasonable application of, clearly established federal law.

**II. Systematic Bias**

In Claim Two, petitioner alleges that "[t]he Board demonstrates systematic bias in their decision making by denying grants of parole to 98.5% of appearing inmates while [simultaneously] denying 100% of all administrative appeals." Petition at 5. Petitioner contends that the Board conducted a "pro forma" parole hearing and denied him due process. *Id.* at 8. Petitioner also contends that an evidentiary hearing is necessary to determine mathematically whether the state demonstrates an unconstitutional bias against granting parole. Traverse ¶ 16. This claim does not merit relief.

The court's independent review of the record reveals that the Board provided petitioner an opportunity to testify at the hearing and present documentary evidence of positive behavior during incarceration. The transcript reflects that the Board reviewed the evidence extensively and discussed it with petitioner and his attorney. Answer Ex. C at 7-54. In announcing its decision, the Board explained the facts it relied upon in finding him not suitable for parole. *Id.* at 56-59. These factors tend to negate the accusation of bias by demonstrating that the Board considered individualized facts and evidence in petitioner's case, and petitioner has not shown otherwise. Nor has petitioner made the showing necessary for an evidentiary hearing. *See* 28 U.S.C. § 2254(e)(2). The state courts' rejection of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law.

**III. Right to Jury Trial**

In his traverse, petitioner raises a new claim that by denying parole, the Board made a post-trial factual finding that determines the length of his prison term in violation of his right to trial by jury under *Blakely v. Washington*, 542 U.S. 296 (2005). This claim was not presented in the petition, and petitioner may not raise new claims for relief in the traverse. *See Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994), *cert. denied*, 514 U.S.

1026 (1995). Nor has petitioner demonstrated that he has exhausted the remedies available in state court. *See* 28 U.S.C. § 2254(b), (c).

Although petitioner did not raise properly the *Blakely* claim or exhaust his remedies, the court denies relief on the merits of this claim. 28 U.S.C. § 2254(b)(2). The statutory maximum for petitioner's crime, murder in the second degree, is life imprisonment. Cal. Penal Code § 190(a). No additional facts must be found beyond those which were found by the jury at petitioner's trial in order for him to be imprisoned for life. Petitioner has no right to a jury trial in connection with parole determinations before the expiration of his life sentence. *See Blakely*, 542 U.S. at 308-09 ("indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion"). This claim is therefore denied.

**CONCLUSION**

Based on the foregoing, the petition for a writ of habeas corpus is DENIED. The clerk of the court shall close the file.

**IT IS SO ORDERED.**

Dated: June 5, 2008

PHYLLIS J. HAMILTON
United States District Judge

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